IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 273

FEDERAL POWER COMMISSION, *Petitioner*,

v.

H. L. HUNT; W. H. HUNT, Trustee for Hassie Hunt Trust; CAROLINE HUNT SANDS; NELSON BUNKER HUNT; J. A. GOODSON, Trustee for Caroline Hunt Trust Estate; A. G. HILL, Trustee for Lamar Hunt Trust Estate, *Respondents*.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. A, pp. 17-38) is reported at 306 F. 2d 334.

JURISDICTION

The judgments of the court of appeals reversing the orders of the Federal Power Commission and remanding the proceedings were entered on July 19, 1962 (Pet. App. B, pp. 39-40). A petition for rehearing en banc filed by the Commission on August 23, 1962, was denied by the court on April 16, 1963. The Commission would invoke the jurisdiction of this Court to review the judgments below under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Whether the court of appeals was correct in holding that, while the Commission could condition its authorization of a sale of natural gas by an independent producer under Section 7 of the Natural Gas Act upon a specific reduction in the proposed initial price, the Commission could not properly condition such authorization to preclude the producer from seeking a determination of the justness and reasonableness of his proposed price by the filing of a rate increase application under Section 4(d) of the Act.

STATUTE INVOLVED

Pertinent provisions of the Natural Gas Act (Sections 4 and 7(b), (c) and (e); 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w) appear in Appendix C to the petition for certiorari, pp. 41-47. The provisions of Sections 5(a), 15(a) and 19(b) of the Act, as amended, are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

Respondents are independent producers of natural gas. As such, their sales of gas for resale in interstate commerce are subject to regulation under the Natural

Gas Act by the Federal Power Commission. The cases below arose on petitions filed by Respondents to review orders of the Commission granting Respondents temporary certificate authorization under Section 7(c) of the Act for new sales of gas. The orders complained of required, as a condition of such authorization, that Respondents reduce their proposed initial price to the pipeline purchaser and, further, that Respondents forego the right to seek their initial contract prices under the rate changing procedures of Section 4(d) of the Act pending further order of the Commission. Respondents sought review of both conditions.

The court of appeals based its decision on this Court's decisions in *Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378 (*"Catco"*), and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (*"Mobile"*). While upholding as reasonable and proper the requirement that Respondents reduce their initial price as a condition of being permitted to sell their gas, the court held that the Commission had exceeded its statutory authority in requiring that Respondents relinquish the right to make rate filings under Section 4(d) once their sales had begun.

Rejecting the Commission's contention that a limitation on the filing of rate changes was required by the temporary and *ex parte* nature of the authorization granted Respondents, the court found that Respondents had subjected themselves fully to all of the duties and obligations of natural gas companies when they dedicated their gas to the interstate market. This being so, the court held that the Commission could not lawfully take from Respondents rights and safeguards accorded natural gas companies by the Act as a part

of the duties imposed. Rather than a reasonable limitation on its grant of certificate authority, the court held that the Commission's condition amounted to a prohibition of a right expressly reserved to Respondents by Congress, namely, the right to make and change their rates in the manner prescribed by Section 4(d) of the Act.

ARGUMENT

The Commission asserts three grounds for the issuance of a writ of certiorari: (1) that the decision of the court below is in conflict with the decision of the Third Circuit in *Alabama-Tennessee Natural Gas Co. v. Federal Power Commission*, 203 F. 2d 494; (2) that the decision below unduly restricts the Commission's power to condition its authorization of gas sales by independent producers; and (3) that the court's decision, if allowed to stand, will seriously hamper the Commission's ability to protect consumers of gas from unreasonable charges. None of the grounds asserted warrants the granting of certiorari. There is no conflict of decisions and, despite the Commission's effort to create one, no issue relating to its authority under the Natural Gas Act which has not already been determined by this Court and which was not correctly decided by the court of appeals.

1. The claimed conflict between the Third Circuit's decision in the *Alabama-Tennessee* case, *supra*, and the decision below plainly does not exist. In *Alabama-Tennessee*, the pipeline company, unlike the producer Respondents below, agreed to and in fact requested the condition requiring that it maintain its interim tariff in effect during a fourteen-month period following the commencement of operations. By contrast with Respondents, who were required to reduce their initial

price pending further order of the Commission on their applications for certificates, Alabama-Tennessee was allowed to collect during its developmental period tariff rates higher than those which it had originally proposed at the hearing on its certificate application. When it sought to continue the collection of the higher interim rates at the expiration of the development period, the Commission rejected its proffered rate filing and entered upon a hearing under Sections 5, 7 and 15 of the Act to determine not only a satisfactory form of tariff but the "just, reasonable, non-preferential [and] non-discriminatory rate" to be thereafter observed (10 F.P.C. 1638, 1640). A subsequent rate increase filing, made in the course of the hearing, was rejected on the ground that the issue of what was a just and reasonable rate for the company was then being determined. The interim rates were continued in effect until reduced at the conclusion of the hearing.

It was thus in the context of an appeal from a final order determining a just and reasonable rate for Alabama-Tennessee that the Third Circuit rendered its decision. As Judge Hastie pointed out in the court's decision (203 F. 2d at 497), the reasonableness of the Commission's certificate condition was not challenged by Alabama-Tennessee and, unlike the case below, was not an issue on appeal. Moreover, the Third Circuit clearly did not have before it an order which purported to make it impossible for the company, without prior Commission consent, to seek a determination of the justness and reasonableness of its initial rate, nor did it have before it an order which prevented Alabama-Tennessee from collecting its proposed initial rates pending the outcome of future proceedings.

2. The Commission points out that, unlike the situation in *Alabama-Tennessee*, where the pipeline had been permanently certificated after notice and hearing, there had been no hearing on Respondent's applications when they began delivering gas under emergency authorization and hence, the Commission contends, no showing by Respondents that the public convenience and necessity would be served by a certification of their sales (Pet., p. 7). From this the Commission concludes that it may, "at a minimum," insist that Respondents and other producer-applicants sell their gas while under temporary authorization at rates which will not disturb the existing price line pending a final disposition of their certificate applications (Pet., p. 9). The Commission's conclusion is erroneous.[1]

In *Catco, supra*, the Court recognized that, while rates were not the only factor bearing on the public

[1] Contrary to the Commission's contention that Respondents had demonstrated none of the "elements" (Pet., p. 9) which would justify permanent certification of their sales, Respondents supplied the Commission with all of the information required by the Commission's rules for permanent certification when they applied for temporary authorization, *i.e.*, their applications and their sales contracts evidencing their market. More important, when Respondents began their deliveries of gas at a reduced initial price acceptable to the Commission, they became as fully subject to the requirements of the Natural Gas Act as a producer holding a permanent certificate of public convenience and necessity issued after notice and hearing. The court below noted this fact (Pet. App. A, p. 32), and we do not understand the Commission to contend otherwise. We know of no instance where, after notice and hearing, the Commission has directed the cessation of a sale begun under temporary authorization based on a finding that the public interest did not require a continuation of the sale. Rather, the Commission has consistently taken the position that it would lack authority to order an abandonment of a sale, absent the filing of an application by the producer under Section 7(b) of the Act. *E.g., Socony Mobil Oil Co., Inc.*, 27 F.P.C. 675, 676.

convenience and necessity, the issue of price was in that case and is generally a consideration of prime importance in the issuance of producer certificates. Where the producer's application on its face or on presentation of evidence signals the existence of a situation which would not be in the public interest, the Commission was admonished either to deny the certificate or to condition the certificate issued in such a manner as to reduce the initial price at which the producer's gas is permitted to enter the market. Where, in its discretion, the Commission chooses to condition its certificate, the Court found that:

> "This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, United Gas Pipe Line Co. v. Mobile Gas Service Corp. (US) supra, but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act" (360 U.S. at 391-92).

Responsive to the Court's mandate in *Catco,* the Commission has, since *Catco,* held the price line in the issuance of permanent certificates to producers by what is in essence an "in line" determination based on weighted average field prices and has deferred the determination of just and reasonable rates to further proceedings under Sections 4 and 5 of the Act. The

Commission has followed essentially the same procedure in conditioning the prices at which it will allow producers to dedicate their gas under temporary authorization. Where the initial price set out in the producer's contract appears to be "out of line" with the guideline area price contained in the Commission's Statement of General Policy No. 61-1 (18 C.F.R. § 2.56), the Commission has uniformly conditioned the initial price in its grant of temporary authority at or below the guideline area price in the Policy Statement.

Thus, with respect to all new sales of gas by producers since the Court's decision in *Catco*, whether begun under permanent or temporary certificate authority, the Commission has followed the Court's mandate in exercising its conditioning power under Section 7 of the Act to hold the line pending a determination of just and reasonable rates under Sections 4 and 5. In so doing, the Commission has afforded consumers the full protection contemplated by the Court in *Catco*, while preserving the producer's "remedy to protect himself" (360 U.S. at 389), namely, the right to increase his rates, subject to refund, pending a determination of their justness and reasonableness under Section 4 of the Act. *Accord, Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 156.

The Commission's insistence that it must now have, at a minimum, the power to prohibit rate increase filings by independent producers amounts to an argument that consumers be afforded a greater degree of protection than the Court in *Catco* found was intended by Congress. It represents, moreover, an assertion by the Commission that, in the exercise of its conditioning power under Section 7 of the Act, it may suspend initial prices agreed upon by the parties, notwithstand-

ing the Court's clear holding in *Catco* that "the Commission was not given the power to suspend initial rates under § 7" (360 U.S. at 390). The Commission's assertion that its powers under Section 7 may be thus enlarged *sua sponte* is erroneous and was correctly held so by the court of appeals.

3. The contention that the decision below, if allowed to stand, will have a far-reaching practical effect on the Commission's ability to protect the consumer is nothing more than an argument of administrative convenience. Any dissatisfaction the Commission may feel regarding the powers given it under the Natural Gas Act to cope with the burden of producer regulation can hardly justify its action in prohibiting the exercise of rights reserved to producers regulated under the Act. The Commission is a creature of Congress and its powers are limited to those conferred by Congress. *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316; *Stark* v. *Wickard*, 321 U.S. 288, 309; *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 432-33; *Delta Air Lines, Inc.* v. *Summerfield*, 347 U.S. 74; *Montana-Dakota Utilities Co.* v. *Federal Power Commission*, 169 F. 2d 392, 397 (8th Cir. 1948), *cert. denied*, 335 U.S. 853.

With regard to the Commission's argument that refunds are neither a complete nor perfect remedy considering the difficulties and delays inherent in its determination of just and reasonable rates, we can only observe, as did the court below (Pet. App. A, p. 31), that this is the unavoidable consequence of a unique statutory regulatory scheme in which, as *Mobile supra*, points out, the rates of natural gas companies are initially fixed and changed by private contract. Any change in the scheme must be made by Con-

gress. In this regard, the Third Circuit's decision in *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 202 F. 2d 899, is particularly apt. In holding that the Commission had improperly rejected, "without color of statutory authority," a Section 4 rate filing by the company, Judge Hastie, speaking for the court, said:[2]

> "We can understand, as the argument in this case has seemed to imply, that the Commission may have had to contemplate serious injury to the public interest because of its inability with very limited funds and staff to perform the enormous task of investigation and analysis imposed upon it in times when so many public utilities are submitting important proposals within its jurisdiction and the statutory scheme requires it to act promptly or let proposals go by default. But the remedy lies with Congress. If changes in the law are needed, or more personnel to administer existing law, or both, it is not for the administrative agency or the courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them. Viewed in most favorable light, that seems to us to be what the Commission has tried to do here. It follows that the order . . . [rejecting the company's Section 4 filing] must be set aside as wholly beyond the authority of the Commission" (202 F. 2d at 902-03).

The Commission states that more than 2,000 producer applications for certificates are now pending

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[2] Judge Hastie, in delivering the court's opinion, spoke for the same panel of the court which, some two months later, decided *Alabama-Tennessee, supra.*

and that, if the decision below is allowed to stand, the sheer volume of applications involved may well require the Commission, in the interest of consumer protection, to deny requests for temporary authority where an increase in its guideline area prices would be threatened by the grant of such authorization (Pet., p. 14). This implicit threat to producers is deserving of little comment. As the Commission itself recognizes, the consuming public has as much of an interest in a continuing source of gas supply as does the producer. The Commission has responded to the peculiar nature of the producing industry's problems by making available a procedure for emergency authorization whereby the producer, faced with the drainage and flaring of his gas, and often the loss of his leases, may bring his wasting asset to market with a minimum of delay. The Commission approves or conditions downward the price at which that asset may initially enter the interstate market. In so doing, it exercises its conditioning powers under Section 7 of the Natural Gas Act in the public interest to hold the price line pending a determination of the producer's just and reasonable rate. It cannot and is not required to do more.[3]

Finally, as the court below noted (Pet. App. A, pp. 36-37), if the Commission may suspend statutory filing rights under Section 4 of the Natural Gas Act, it may just as well deny producers the right of review by

[3] Of the 2,000 pending certificate applications referred to by the Commission, we would suggest that the vast majority will be permanently approved within the very near future under new procedures recently worked out by the Commission. Under these procedures the Commission itself hears and decides producer certificate cases where the initial price proposed by the producer is at or below the area level and no protest has been filed. See FPC Press Release No. 12833, issued July 25, 1963.

rehearing or petition to the courts under Section 19(b) of the Act. The court further noted that this possibility was not in the realm of the academic theoretical since just such a condition is currently being attached to temporary authorization granted independent producers. We believe that in principle there is no difference between Section 4 of the Act and Section 19(b) and that a condition prohibiting the exercise of rights under either section is clearly unlawful.

CONCLUSION

The petition for certiorari involves no conflict of decisions, no question of statutory interpretation not already settled by the Court, no important question of administrative law and no judicial action justifying the exercise of the Court's supervisory powers. The decision of the court of appeals was eminently correct, and the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates. [52 Stat. 823 (1938); 15 U.S.C. § 717d(a)]

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SEC. 15. (a) Hearings under this act may be held before the Commission, any member or members thereof, or any representative of the Commission designated by it, and appropriate records thereof shall be kept. In any proceeding before it, the Commission in accordance with such rules and regulations as it may prescribe, may admit as a party any interested State, State commission, municipality or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose

participation in the proceeding may be in the public interest. [52 Stat. 829 (1938); 15 U.S.C. § 717n(a)]

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SEC. 19 (b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254). [52 Stat. 831 (1938), as amended; 15 U.S.C. § 717r(b)]